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No. 82-486

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

UNITED BROTHERHOOD OF CARPENTERS AND JOINERS OF AMERICA, LOCAL 610 (AFL-CIO), *et al.*,
Petitioners,

v.

PAUL E. SCOTT, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR PETITIONERS

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

MARTIN W. DIES
P.O. Box 490
Orange, Texas 77360

JAMES B. COPPESS
1925 K Street, N.W.
Washington, D.C. 20006
Of Counsel

Attorneys for Petitioners

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

QUESTIONS PRESENTED

1) Whether 42 U.S.C. § 1985(3) protects against interference with rights that, in contrast to the right to travel (at issue in *Griffin* v. *Breckenridge*, 403 U.S. 88), are protected by the Constitution only against state action, where no state action is alleged or proved?

2) Whether individuals who desire to work with others under either union or nonunion conditions, and are for that reason prevented from doing so, comprise a class protected by § 1985(3)?

3) Whether individuals who are not members of a § 1985(3) protected class may nevertheless bring a § 1985 (3) suit for damages?*

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* The parties to this case are
Paul E. Scott
James T. Matthews
A. A. Cross
A. A. Cross Construction Co., Inc.
Bill Moore
Robert Wayne Fault
Bruce Hill
Curtis Beasley
Jay Desormaux
Fish Ferguson
John Wallace, Jr.
Asbestos Workers, Local 22
Asbestos Workers, Local 112
Boilermakers, Local 587
Bricklayers, Local 13
Carpenters, Local 610
Carpenters, Local 753
Carpenters, Local 2007
Cement Masons, Local 884
Cement Masons, Local 804
Lathers, Local 416
Pipefitters, Local 2484
Engineers, Local 450
Painters, Local 328

Pipefitters, Local 1347
Pipefitters, Local 195
Plumbers, Local 504
Electrical Workers, Local 479
Ironworkers, Local 125
Laborers, Local 852
Roofers, Local 116
Sheet Metal Workers, Local 196
Teamsters, Local 920
Laborers, Local 870
Sabine Area Building Trades Council

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BRIEF FOR PETITIONERS

OPINIONS BELOW

The *en banc* opinion of the court of appeals is reported at 680 F.2d 979 and is reproduced at pp. A-1 to A-55 of the separately bound appendix to the petition for a writ of certiorari herein. ("App."). The panel opinion of the court of appeals is reported at 640 F.2d 708 and is reproduced at App. B-1 to B-29. The opinion of the district court is reported at 461 F. Supp. 224 and is reproduced at App. C-1 to C-11.

JURISDICTION

The *en banc* decision and judgment of the court of appeals were issued on July 1, 1982. (App. A-1 to A-55 and E-1 to E-2.) The jurisdiction of the district court was invoked under 42 U.S.C. § 1985(3). The petition for a writ of certiorari was filed on September 20, 1982 and was granted on November 29, 1982. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

This case involves Rev. Stat. § 1980, 42 U.S.C. § 1985 (3), which provides in pertinent part:

> If two or more persons in any State or Territory conspire, or go in disguise on the highway or on the premises of another, for the purpose of depriving, either directly or indirectly, any person or class of persons of the equal protection of the laws, or of equal privileges and immunities under the laws * * * [and] in any case of conspiracy set forth in this section, if one or more persons engaged therein do, or cause to be done, any act in furtherance of the object of such conspiracy, whereby another is injured in his person or property, or deprived of having and exercising any right or privilege of a claim of the United States, the party so injured or deprived may have an action for the recovery of damages, occa-

sioned by such injury or deprivation, against any one or more of the conspirators.[1]

STATEMENT OF THE CASE

A. Factual Background.

For the purpose of the proceedings in this Court, we accept the following description of the parties and the background facts in the majority opinion below: [2]

> This case arises out of an episode of mob violence [at the Cross Construction Co.'s Alligator Bayou Pumping Station construction project near Port Arthur, Texas (during which company employees were injured and company equipment and other property was damaged)] that occurred in the early morning hours of January 17, 1975. The plaintiffs are A. A. Cross Construction Company, Inc., and two of its employees, Paul Scott and James Matthews. The defendants include the Sabine Area Building and Construction Trades Council, a loose confederation of craft and construction unions located in the Port Arthur, Texas, area. Also named as defendants are twenty-five of the Council's member unions and several individual members of some of these labor unions.
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> • • • •
>
> A. A. Cross Construction Company is a Texas corporation engaged in the building and construction industry as a general contractor. In May, 1974, Cross contracted with the Department of the Army, United States Corps of Engineers to erect the Alligator Bayou Pumping Station and Gravity Drainage Structure on the hurricane levee along Taylor's Bayou near Port Arthur.
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[1] 42 U.S.C. § 1985(3) is "the surviving version of § 2 of the Civil Rights Act of 1871." (*Great American Fed. S. & L. Assn. v. Novotny*, 442 U.S. 366, 368.) That provision is occasionally referred to as "§ 1985(c)." (See, *e.g.*, 442 U.S. at 368.)

[2] The omitted portion of that court's description pertains in large part to the identity of those responsible for the January 17, 1975 incident, an issue not before this Court.

> In accordance with its customary practice, the Cross Construction Company hired its workers for the Alligator Bayou project without regard to union affiliation, employing persons solely on the basis of its own need for the applicant's occupational skills. Cross did not have a collective bargaining agreement with any labor union, and when this incident occurred no union was seeking to organize the company's employees. In addition, Cross often hired workers from outside the Port Arthur community.
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> * * * *
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> * * * The entire [January 17] episode lasted only a few minutes, but the destruction was devastating. Cross and his employees were treated for their [resulting] injuries at a local hospital, and work at the construction site did not resume for nearly three weeks. Some of Cross's employees, frightened by the possibility of repeated attacks at the jobsite, refused to return to work. In addition, the violence and vandalism delayed the completion of the project by about six months, ultimately causing the Cross Construction Company to default in its contractual obligation to the U.S. Army Corps of Engineers. [App. A-4 to A-6.]

B. Proceedings in the District Court.

On January 31, 1975, plaintiffs Scott and Matthews initiated this lawsuit against the individual defendants. The plaintiffs sought and obtained a temporary injunction against violent, intimidating, or destructive acts against employees at the Alligator Bayou Pumping Station project. Nearly two years later, the plaintiffs amended their complaint, adding A. A. Cross Construction Company, Inc., as a plaintiff and the Sabine Area Building and Construction Trades Council and twenty-five local unions as defendants.

After trial, the district court found that the plaintiffs had proved that the defendants conspired to deprive plaintiffs of the equal protection of the laws in violation of 42 U.S.C. § 1985(3). That court made the preliminary in-

junction permanent against all the defendants except one of the local unions. The district court also assessed damages against eleven of the local unions: the individual plaintiffs were each awarded $5,000.00; plaintiff Cross Construction Company was awarded $112,385.14. (App. D-1 to D-5.)

C. Proceedings in the Court of Appeals.

The defendants appealed. All the union defendants objected to the injunction as inconsistent with the Norris-LaGuardia Act, 29 U.S.C. §§ 101 *et seq.* The defendants against whom damages had been awarded appealed on the grounds that the plaintiffs had not established a cause of action under 42 U.S.C. § 1985(3), and that the responsibility of the individual organizations had not properly been established under § 6 of the Norris-LaGuardia Act's "clear proof" standard of agency or even under the common law's standard of agency.

A panel of the court of appeals affirmed the district court's construction of 42 U.S.C. § 1985(3) and the judgment against three of the union defendants (the present petitioners) while reversing the damages judgment against all the other union defendants because the evidence on agency was deemed insufficient to establish their responsibility. (App. B-25 to B-28.)

The court of appeals then agreed to rehear the case *en banc*, and on rehearing affirmed the panel's conclusions in all respects by a 14-10 vote. In an opinion by Judge Charles Clark (the author of the panel decision), that court concluded, insofar as is presently pertinent:

> Congress intended 42 U.S.C. § 1985(3) to provide a remedy for private conspiracies directed at nonracial classes. Specifically, we determine that the statute encompasses a conspiracy designed to deprive nonunion workers of the First Amendment right to freely associate with one another where that conspiracy does not occur in conjunction with legitimate union activity and is perfected by force and violence. [App. A-29 to A-30.]

Judge Clark concluded that the district court's findings "that the [present petitioners] authorized or participated in this conspiracy were not clearly erroneous," and affirmed the judgment against petitioners. (App. A-30.)[3]

Three dissenting opinions were filed. Judges Rubin and Williams authored an opinion (sometimes hereafter referred to as "the principal dissent") for eight members of the court below concluding, *inter alia*, that 42 U.S.C. § 1985(3) does not grant a cause of action to the plaintiffs here. (App. A-36 to A-49.) Judge Garwood filed a separate dissenting opinion concluding that the plaintiffs had not stated a cause of action under 42 U.S.C. § 1985(3). (App. A-50 to A-55.) Judge Anderson dissented without reaching the § 1985(3) issues. (App. A-50.)

SUMMARY OF ARGUMENT

In part I we describe in detail the legislative history of § 2 of the Civil Rights Act of 1871, now 42 U.S.C. § 1985(3). That description reconfirms the conclusion in *Griffin* v. *Breckenridge*, 403 U.S. 88, 101 that § 1985(3) "cover[s] private conspiracies" but not "all tortious conspiratorial interferences with the rights of others." We then draw two indisputable lessons, each of which requires rejection of the majority below's theory that § 1985(3) provides a remedy for the plaintiffs here:

a) The dominant concern of the moderate Republicans who sought and secured a limiting amendment to § 2 of the 1871 Act was to assure that Congress, in providing a cause of action against tortious conspiracies, did not exceed the scope of the Federal Government's authority stated in the Reconstruction Amendments to the Constitution as those Republicans' understood those Amendments. The focus was on the potential application of § 2 to deprivations of rights stated in the Fourteenth Amend-

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[3] The majority below held that responsibility was to be determined under the common law standard rather than under § 6 of the Norris-LaGuardia Act. The other defendant unions were absolved of responsibility even under the common law standard. (App. A-30.)

ment. As Rep. Garfield made plain, that Amendment's limitation on the power of the State governments applies up to the point but no further than the point at which "the laws are just and equal on their face, yet, by [the State's] systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." (Globe App. 153.) Thus, with respect to Fourteenth Amendment rights (which plaintiffs herein assert), the sum and substance of the compromise struck and enacted into law as § 2 of the 1871 Act, is clearly and accurately stated by Justice Stevens' concurring opinion in *Great American Fed. S. & L. Assn.* v. *Novotny*, 442 U.S. 368, 384-385:

> If * * * private persons engage in purely private acts of discrimination * * * they do not violate the Equal Protection Clause of the Fourteenth Amendment. The rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are rights to protection against unequal or unfair treatment by the State, not by private parties. Thus, while § 1985(c) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action, in this context, is no more than a requirement that there be a constitutional violation. [Footnote omitted.]

(b) Although the precise nature of the discriminatory animus sufficient to bring a conspiracy within § 1985(3) is inherently elusive, this much is plain: even the broadest statement of the proviso's scope by a proponent, Sen. Edmunds (quoted *infra* p. 34), shows that the provision does not reach this case. As Judge Merritt wrote in reflecting on Sen. Edmunds' remarks:

> Defendants here, given their motive, would have thwarted due process for all those—and only those —who crossed [a] picket line. Crossing a picket line is not a special exercise of the right to a probable cause arrest in the same sense—to use another of

> [Sen.] Edmunds' examples—that being a Democrat is a discrete and particular exercise of the First Amendment. Thus, plaintiffs' class is simply one of picket line crossers. No matter how "invidious" any discrimination against this class may be, the right to cross a picket line is no more constitutionally protected than is the right to be an unpopular barn owner. [*Browder* v. *Tipton*, 630 F.2d 1149, 1154 (C.A. 6)]

In part II we show that, contrary to the admonition of *Griffin*, the majority below has transmuted § 1985(3) into a "general federal tort law" (403 U.S. at 102). We show first that the court below erred in rejecting Justice Stevens' view in *Novotny*. The majority below missed the critical distinction drawn by him in *Dombrowski* v. *Dowling*, 459 F.2d 190, 193 (C.A. 7), "between the interests of the plaintiff that the statute was enacted to protect and the conduct of the conduct of the defendants which it proscribes." We show next that the majority below also misconstrued the precedents in this Court by ruling that "merely working for a nonunion employer [does] qualify for constitutional protection" (App. A-12). *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463, held that the First Amendment right to associate does not encompass the right to bargain collectively; the existence or nonexistence of that right is left to legislative action. It follows that the right *not* to associate cannot encompass a right *not* to bargain collectively. We then show by quoting from the principal dissent below that the individual plaintiffs are not members of a "class" at all (App. A-43, A-44), and even if they are, this "class is one newly defined by this case, not one having any previous discernible jurisprudential identity," (App. A-46). It is concededly a closer question whether, *if* the individual plaintiffs have stated a claim, their employer is also entitled to relief under § 1985(3). We submit that the better view is that he is not, because the 42nd Congress did not intend to provide a remedy to persons outside the limited class protected in the compromise which was enacted as § 2 of the 1871 Act.

ARGUMENT

I. 42 U.S.C. § 1985(3) Does Not Reach This Case

1. *The Prior Case Law*

The questions presented here as to the reach of 42 U.S.C. § 1985(3) (quoted *supra* pp. 2-3) are, we believe, best understood against the background provided by this Court's recent decisions construing that provision—*Griffin* v. *Breckenridge*, 403 U.S. 88 and *Great American Fed. S.&L. Assn.* v. *Novotny*, 442 U.S. 366.

(a) In *Griffin* the Court overruled *Collins* v. *Hardyman*, 341 U.S. 651, "which in effect construed the * * * language of § 1985(3) as reaching only conspiracies under color of state law" (403 U.S. at 92) and held that it is "evident that all indicators—text, companion provisions, and legislative history—point unwaveringly to § 1985(3)'s coverage of private conspiracies," (*id* at 101). Recognizing, too, that "the enormous sweep of the original language [of § 1985(3)] led to pressures for [limiting] amendment" (*id.* at 100), which pressures were successful (see *id.* at 99-101), the *Griffin* Court added the following *caveat*:

> *That the statute was meant to reach private action does not, however, mean that it was intended to apply to all tortious, conspiratorial interferences with the rights of others.* For, though the supporters of the legislation insisted on coverage of private conspiracies, they were equally emphatic that they did not believe, in the words of Representative Cook, "that Congress has a right to punish an assault and battery when committed by two or more persons within a State." * * * The constitutional shoals that would lie in the path of interpreting § 1985(3) as a general federal tort law can be avoided by giving full effect to the congressional purpose—by requiring, as an element of the cause of action, the kind of invidiously discriminatory motivation stressed by the sponsors of the limiting amendment. See the remarks of Representatives Willard and Shellabarger,

quoted *supra*, at 100. The language requiring intent to deprive of *equal* protection, or *equal* privileges and immunities, means that there must be some racial, or perhaps otherwise class-based, invidiously discriminatory animus behind the conspirators' action.[9] The conspiracy, in other words, must aim at a deprivation of the equal enjoyment of rights secured by the law to all.

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[9] We need not decide, given the facts of this case, whether a conspiracy motivated by invidiously discriminatory intent other than racial bias would be actionable under the portion of § 1985(3) before us. Cf. Cong. Globe, 42d Cong., 1st Sess., 567 (1871) (remarks of Sen. Edmunds).

[403 U.S. at 101-102; first emphasis added; other footnote omitted.]

These guidelines for determining the type of private conspiracies subject to redress under § 1985(3) were sufficient for the decision in *Griffin* for two reasons. The first concerned the nature of the *Griffin* complaint which

> fully alleges, with particulars, that the respondents conspired to carry out the assault. It further asserts that "[t]heir purpose was to prevent [the] plaintiffs and other Negro-Americans, through . . . force, violence and intimidation, from seeking the equal protection of the laws and from enjoying the equal rights, privileges and immunities of citizens under the laws of the United States and the State of Mississippi," including a long list of enumerated rights such as free speech, assembly, association, and movement. The complaint further alleges that the respondents were "acting under a mistaken belief that R. G. Grady was a worker for Civil Rights for Negroes." [403 U.S. at 103.]

The Court concluded that "the conduct here alleged lies so close to the core of the coverage intended by Congress that it is hard to conceive of wholly private conduct that would come within the statute if this does not." (*Id.* at 104.) Second, given the nature of those allegations, it

was plain that the holding that § 1985(3) applied created no constitutional difficulties:

> "Congress has the power under the Thirteenth Amendment rationally to determine what are the badges and the incidents of slavery, and the authority to translate that determination into effective legislation." * * * We can only conclude that Congress was wholly within its powers under § 2 of the Thirteenth Amendment in creating a statutory cause of action for Negro citizens who have been the victims of conspiratorial, racially discriminatory private action aimed at depriving them of the basic rights that the law secures to all free men.
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> * * * *
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> Our cases have firmly established that the right of interstate travel is constitutionally protected, does not necessarily rest on the Fourteenth Amendment, and is assertable against private as well as governmental interference. * * * The "right to pass freely from State to State" has been explicitly recognized as "among the rights and privileges of National citizenship." * * * That right, like other rights of national citizenship, is within the power of Congress to protect by appropriate legislation. [403 U.S. at 105-106; citations omitted.]

(b) In *Novotny*, the Court reviewed a Third Circuit ruling

> that conspiracies motivated by an invidious animus against women fall within § 1985(c), and that Novotny, a male allegedly injured as a result of such a conspiracy, had standing to bring suit under that statutory provision. It ruled that Title VII could be the source of a right asserted in an action under § 1985(c), and that intracorporate conspiracies come within the intendment of the section. Finally, the court concluded that its construction of § 1985(c) did not present any serious constitutional problem. [442 U.S. at 370.]

In reversing that ruling this Court reasoned:

> Section 1985(c) provides no substantive rights itself; it merely provides a remedy for violation of the rights it designates. * * *
>
> Under Title VII, cases of alleged employment discrimination are subject to a detailed administrative and judicial process designed to provide an opportunity for nonjudicial and nonadversary resolution of claims. * * *
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> * * * *
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> If a violation of Title VII could be asserted through § 1985(c), a complainant could avoid most if not all of these details and specific provisions of the law. * * *
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> Section 1985(c) * * * *creates* no rights. It is a purely remedial statute, providing a civil cause of action when some otherwise defined federal right—to equal protection of the laws or equal privileges and immunities under the laws—is breached by a conspiracy in the manner defined by the section. * * * The right Novotny claims under § 704(a) did not even arguably exist before the passage of Title VII. * * *
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> * * * *
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> Unimpaired effectiveness can be given to the plan put together by Congress in Title VII only by holding that deprivation of a right created by Title VII cannot be the basis for a cause of action under § 1985(c). [442 U.S. at 372-378 omitting discussion of the detailed provisions of Title VII; emphasis in original.]

(c) The district court made it plain that the instant case "does not involve an allegation of racial discrimination, nor an interference with the right to travel interstate." (App. C-4). Rather the courts below found that the private action here was motivated by an "animus directed at nonunion workers who are attacked for their choice to associate with other nonunion workers thereby enabling an employer to offer significant work to th[at] class [of workers] * * *." (App. A-18.) That "choice to

associate" was labeled by the majority below as one of "economic * * * association * * * closely akin to political association." (*Id.*)

Thus, this case is remote from the area held by *Griffin* to be covered by § 1985(3)—the area of private action motivated by "racial discriminatory animus" (403 U.S. at 102) the Thirteenth Amendment specifically grants Congress the power to redress. And if one accepts, arguendo, the novel view of the majority below that there is an associational right stated in the Constitution to work in the private sector under an industrial relations system of one's choice, this case is not governed by *Novotny*.

It is therefore appropriate to begin with a fuller description of § 1985(3)'s legislative history than was necessary in *Griffin* or in *Novotny*. In so doing—as the Court noted in undertaking a like task with regard to one of § 1985 (3)'s companion pieces (§ 1983)—"[a]s in all cases of statutory construction, our task is to interpret the words of these statutes in light of the purposes Congress sought to serve." (*Chapman* v. *Houston Welfare Rights Org.*, 441 U.S. 600, 608.)

2. *The Background of the Civil Rights Act of 1871*

Section 1985(3) is, as we have seen, the lineal descendent of § 2 of the Civil Rights Act of 1871, 17 Stat. 13. This Court has many times reviewed the genesis and the legislative evolution of that Act and we draw on those opinions to put § 2 into its context.

District of Columbia v. *Carter*, 409 U.S. 418, describes the impetus to legislative action:

> After the Civil War ended in 1865, race relations in the South became increasingly turbulent. The Ku Klux Klan was organized by southern whites in 1866, and a wave of murders and assaults was launched against both blacks and Union sympathizers. Thus, at the opening of the 42d Congress, considerable apprehension was expressed by Republicans about the

> insecurity of life and property in the South, and on March 23, 1871, President Grant sent a message to Congress requesting additional federal legislation to curb this rising tide of violence. Such legislation was deemed essential in light of the inability of the state governments to control the situation. Five days later, Congressman Shellabarger of Ohio introduced the bill that eventually was to become the Ku Klux Klan Act of 1871. [409 U.S. at 425-426; footnotes omitted.]

Monell v. *New York City Dept. of Social Services*, 436 U.S. 658, 665-669, in turn, outlines the "three distinct stages in the legislative consideration" of the bill so introduced:

> On March 28, 1871, Representative Shellabarger, acting for a House select committee, reported H.R. 320, a bill "to enforce the provisions of the fourteenth amendment to the Constitution of the United States, and for other purposes." H.R. 320 contained four sections. Section 1, now codified as 42 U.S.C. § 1983, was the subject of only limited debate and was passed without amendment. Sections 2 through 4 dealt primarily with the "other purpose" of suppressing Ku Klux Klan violence in the Southern States.[11] The wisdom and constitutionality of these sections—not § 1, now § 1983—were the subject of almost all congressional debate and each of these sections was amended. The House finished its initial debates on H.R. 320 on April [6], 1871, and one week later the Senate also voted out a bill.

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[11] Briefly, § 2 created certain federal crimes in addition to those defined in § 2 of the 1866 Civil Rights Act, 14 Stat. 27, each aimed primarily at the Ku Klux Klan. Section 3 provided that the President could send the militia into any State wracked with Klan violence. Finally, § 4 provided for suspension of the writ of habeas corpus in enumerated circumstances, again primarily whose thought to obtain where Klan violence was rampant. See Cong. Globe, 42d Cong., 1st Sess., App. 335-336 (1871) (hereinafter Globe App.).

* * * *

> The House [on April 15, 1871] refused to acquiesce in a number of amendments made by the Senate * * * and the respective version of H.R. 320 were therefore sent to a conference committee. Section 1 of the bill, however, was not a subject of this conference since, as noted, it was passed verbatim as introduced in both Houses of Congress.
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> On April 18, 1871, the first conference committee completed its work on H.R. 320. * * *
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> The first conference substitute passed the Senate [on April 18] but was rejected by the House [on April 19]. * * *
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> Because the House rejected the first conference report a second conference was called and [on April 19] issued its report [which was accepted. The resulting legislation was signed into law on April 20, 1871.] [Footnotes omitted]

It remains only to make two additional introductory points. Section 2 of the 1871 Act, which was subject to only minor technical amendments in the Senate, like § 1, was accepted by the House as passed by the Senate prior to the first conference. Thus, the critical debate on § 2 occurred during the first stage of the 1871 Act's legislative evolution. Second, as *Monroe* v. *Pape*, 365 U.S. 167, states and as *Griffin* and *Monell* confirm: "As introduced § 2 was very broad * * * It was this provision that raised the greatest storm. It was § 2 that was rewritten * * *." (365 U.S. at 180-181.)

That "rewriting," as we now show, was done in the House of Representatives in the days between March 28, 1871 when the bill was introduced and April 6 when the bill as amended passed the House. Given the sheer mass of the materials we proceed: (1) by setting out the description of the original § 2 by Rep. Shellabarger and noting the comments of the other supporters of that version of the bill; (2) by setting out the objections to the original § 2 stated by the "moderate" Republicans—who

held the balance of power—as stated by then Rep. (later President) Garfield in his speech of April 4, 1871 and noting the comments of others of that group; (3) by setting out the explanation of the amended § 2 proposed on April 5, 1871—and adopted by the House without change and eventually enacted with only minor technical Senate changes—by Rep. Shellabarger and by the moderate Republicans who had opposed the original § 2 and who changed their position by reason of the amendment; and (4) by canvassing in shorter compass the Senate debate since, as stated by Sen. Edmunds, the Chairman of the Senate Judiciary Committee, the Senate "did not intend to go beyond the scope of the House bill."

3. *The Evolution of, and the Legislative Debates on, § 2 of the Civil Rights Act of 1871*

(a) Rep. Shellabarger reported H.R. 320 on behalf of the select committee to which President Grant's message had been referred. (Cong. Globe, 42d Cong., 1st Sess., 317 (1871) (hereafter "Globe").) Section 2 of that bill provided:

> Sec. 2. That if two or more persons shall, within the limits of any State, band, conspire, or combine together to do any act in violation of the rights, privileges, or immunities of any person, to which he is entitled under the Constitution and laws of the United States, which, committed within a place under the sole and exclusive jurisdiction of the United States, would, under any law of the United States then in force, constitute the crime of either murder, manslaughter, mayhem, robbery, assault and battery, perjury, subornation of perjury, criminal obstruction of legal process or resistance of officers in discharge of official duty, arson, or larceny; and if one or more of the parties to said conspiracy or combination shall do any act to effect the object thereof, all the parties to or engaged in said conspiracy or combination, whether principals or accessories, shall be deemed guilty of a felony, * * *. [Globe App. 68-69]

Rep. Shellabarger described the purpose of this section as follows:

> The whole design and scope of the second section of this bill was to do this: to provide for the punishment of any combination or conspiracy to deprive a citizen of the United States of such rights and immunities as he has by virtue of the laws of the United States and of the Constitution thereof. [Globe 382]

In debate with Rep. Farnsworth, who thought the bill went too far in providing federal punishment for criminal activity, Rep. Shellabarger insisted that, "the gist of the offense in the second section is in the conspiracy to defeat United States law made in protection of the fundamental rights of national citizenship, * * *." (Globe App. 113-114.)

Rep. Shellabarger contended that Congressional authority to legislate directly with respect to the actions of individuals was provided by §§ 1 & 5 of the Fourteenth Amendment. He noted first that § 1 directed that certain persons are citizens of the United States and from this concluded that "The making of them United States citizens and authorizing Congress by appropriate law to protect that citizenship gave Congress power to legislate directly for enforcement of such rights as are fundamental elements of citizenship." (Globe App. 69.) Next, he observed that these fundamental rights, encompassed in the term "privileges and immunities," included especially the right to "protection by Government." (Globe App. 69; see *Monell*, 436 U.S. at 670 (discussing Rep. Shellabarger's point).)

Following his discussion of § 2 of H.R. 320, Rep. Shellabarger turned to § 3, which defined denial of equal protection as a failure or refusal of the state to give protection from violence or unlawful combinations that so obstruct the execution of the laws as to deprive a "portion or class of the people" of rights named in the bill. His argument in support of this section is of special

interest because it clearly states his understanding of the privileges and immunities and the equal protection clauses of the Fourteenth Amendment and their interaction:

> I now again go back to the first section of the fourteenth article. That section provides two things which I wish to notice. The first provision is that—
>
> "No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States."
>
> This provision requires that the laws on their face shall not "abridge" the privilege or immunities of citizens. It secures equality toward all citizens on the face of the law. It provides that those rights shall not be "abridged;" in other words, that one man shall not have more rights upon the face of the laws than another man. By that provision equality of legislation, so far as it affects the rights of citizenship, is secured. But the section does not stop there. It contains two other provisions, only one of which I need now notice. It provides:
>
> "Nor shall any State deprive any person of life, liberty, or property, without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws."
>
> The laws must be, first, equal, in not abridging rights; and second, the States shall equally protect, under equal laws, all persons in them. Therefore, under the provisions of the fourteenth amendment, when these clauses are put in juxtaposition, in order to bring the idea together, Congress shall have power to make and enforce all proper legislation which shall be necessary to require of the States that they shall not abridge the rights of citizenship, and also that they shall protect all persons equally. Nothing can be plainer. The thing is so absolutely self-evident that it admits of no enforcement by argument. *Two things are provided—equal laws and protection for all; and whenever a State denies that protection Con-*

gress may by law enforce protection. [Globe App. 71; emphasis added]

Although some members of the House took a more sweeping view of federal authority (*e.g.*, Globe App. 83-85 (Rep. Bingham)), most of the supporters of H.R. 320 as introduced followed the sense of Rep. Shellabarger's opening remarks and argued that the source of federal authority lay in the *de facto* denial of equal protection resulting from the failure of the Southern States to enforce the law against the Klan. (*E.g.*, Globe App. 72-73 (Rep. Blair), 78-80 (Rep. Perry), Globe 322 (Rep. Stroughton), 368 (Rep. Sheldon), 375 (Rep. Lowe), 428-429 (Rep. Beatty), 448 (Rep. Butler), 459 (Rep. Coburn); *see* Flack, *The Adoption of the Fourteenth Amendment* 228 (1908); Harris, *The Quest for Equality* 45-46 (1960).) Typical are the views expressed by Rep. Hoar:

> But I may be asked, how do you distinguish the right to interfere in a case like this from the right to interfere in any case where there may be an imperfection in the administration of justice or incomplete security for human rights? Sir, criminals escape punishment in Massachusetts, in Vermont. A railroad company does not stand a fair chance for an impartial verdict before a Wisconsin jury. Is Congress to interfere? My answer to that is this: that *it is not possible to draw an absolute logical line between these two cases. The difference is a difference of degree. To authorize the interference of Congress there must be, not merely those imperfections and failures in the administration of law which are attendant upon all civil governments alike, but there must be a clear case of denial of government.* We cannot interfere to deal with the incidental evils which attend upon republican government; but we should interfere where, we being the judges whether the case exists or not, on our oaths responsible to the great tribunal of the American people, wherever these evils have attained such a degree as amounts to the destruction, to the overthrow, to the denial to large

classes of the people of the blessings of republican government altogether.

Another error, as it seems to me, Mr. Speaker, is to suppose that Congress in the exercise of this great power must either let the State alone altogether, or take entire possession of all its powers and instrumentalities of government, and displace the State government. But there is nothing in the Constitution that for a moment favors that idea. *We have a right to limit our interference to the extent of the evil.* If a particular class of persons are denied their civil rights permanently and as a rule in any State, we have a right to interfere simply to protect those rights, leaving the republican government, so far as it is enforced in regard to others, untouched where we can. [Globe 334; emphasis added]

Following a discussion of privileges and immunities, which consisted almost entirely of a lengthy quotation from *Corfield* v. *Coryell*, 4 Wash.Cir.Ct. Rep. 380, 6 Fed. Cas. 546 (No. 3,230) (C.C.Pa. 1823), Rep. Hoar turned to the equal protection clause:

Now, sir, what does the Constitution mean when it authorizes Congress to interfere by "appropriate legislation" in the case of the denial by a State to any person within its jurisdiction of the protection of the laws? If it had been the purpose of the American people, in accepting this article, to provide merely for the case of an affirmative formal exercise of power by the State in derogation of civil rights, that last clause would have been unnecessary, because the preceding part had provided that "no State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States." But the provision goes on to say that no State shall "deny to any person within its jurisdiction the equal protection of the laws."

Now, *it is an effectual denial by a State of the equal protection of the laws when any class of officers charged under the laws with their administration*

permanently and as a rule refuse to extend that protection. [Globe 334; emphasis added]

(b) Strong objections were raised by several Republican Congressmen who thought the original draft of § 2 of H.R. 320 went too far in legislating on matters within the exclusive province of the states. (Globe App. 112 (Rep. Moore), 113-117 (Rep. Farnsworth), 150-153 (Rep. Garfield), 188 (Rep. Willard), 313-315 (Rep. Burchard), Globe 485-486 (Rep. Cook), 514 (Rep. Poland).) The clearest and most influential statement of this "moderate" position was given by Rep. (later President) Garfield, on April 4, 1871, in what has been called, "[t]he most significant speech of the debate." (Harris, *Quest for Equality* 47; *see* Flack, *Adoption of the Fourteenth Amendment* 238-240.)

Rep. Garfield began his speech by stating the general principle that informs the entire succeeding discussion:

> No more beautiful thought was embodied in the structure of our Republic than this: that our fathers did so distribute the powers of government that no one power should be able to swallow, absorb, or destroy the others. In this distribution, it is provided that many, indeed most of the functions of government, shall be exercised immediately under the eyes of the people themselves. [Globe App. 149]

As a matter of constitutional authority then

> I presume it will not be denied, that before the adoption of the last three amendments it was the settled interpretation of the Constitution that the protection of the life and property of private citizens within the States belonged to the State governments exclusively.
>
> • • • •
>
> Now, three amendments, the thirteenth, fourteenth, and fifteenth, have been added to the Constitution, and it will not be denied that each of these amendemnts has so modified the Constitution as to change the relation of Congress to the citizens of the States. They have to some extent enlarged the

> functions of Congress, and, within prescribed limits, have extended its jurisdiction within the States. [Globe App. 150]

The rest of the speech concentrated on the Fourteenth Amendment.

Rep. Garfield emphasized that careful analysis of the Fourteenth Amendment's relation to the pending bill was warranted for two reasons—not only was that Amendment the stated constitutional basis for the bill but the debates would undoubtedly be taken as informative of the Amendment's meaning:

> I now come to consider last in order, for it is the basis of the pending bill, the fourteenth amendment. I ask the attention of the House to the first section of that amendment, as to its scope and meaning. I hope gentlemen will bear in mind that this debate, in which so many have taken part, will become historical, as the earliest legislative construction given to this clause of the amendment. Not only the words which we put into the law, but what shall be said here in the way of defining and interpreting the meaning of the clause, may go far to settle its interpretation and its value to the country hereafter. [Globe App. 150]

Before discussing the Amendment itself, Rep. Garfield recalled that as originally proposed the Fourteenth Amendment would have allowed Congress to legislate directly to protect the life, liberty and property of citizens of the United States, but that the first proposal had been rejected precisely because of this breadth of application:

> Now, let it be remembered that the proposed amendment was a plain, unambiguous proposition to empower Congress to legislate directly upon the citizens of all the States in regard to their rights of life, liberty, and property. Mark the action of the House. After a debate of two weeks, the record of which covers more than one hundred and fifty columns of the Globe, and in which the proposed amendment was subjected to a most searching ex-

> amination, it became evident that many leading Republicans of this House would not consent to so radical a change in the Constitution, and the bill was recommitted to the joint select committee. [Globe App. 151]

Rep. Garfield concluded this portion of his speech by comparing the Fourteenth Amendment as adopted with the rejected proposal:

> The one exerts its force directly upon the States, laying restrictions and limitations upon their power and enabling Congress to enforce these limitations. The other, the rejected proposition, would have brought the power of Congress to bear directly upon the citizens, and contained a clear grant of power to Congress to legislate directly for the protection of life, liberty, and property within the States. The first limited but did not oust the jurisdiction of the State over these subjects. The second gave Congress plenary power to cover the whole subject with its jurisdiction, and, as it seems to me, to the exclusion of the State authorities. [Globe App. 151]

Rep. Garfield then turned to a clause by clause examination of the first section of the Fourteenth Amendment, explaining,

> Mr. Speaker, I now inquire to what extent this section does enlarge the powers of Congress. On the proper answer to this inquiry will chiefly rest our power of legislation on the subject before us. [Globe App. 151]

He first discussed the citizenship clause and rejected Rep. Shellabarger's argument that this provided authority for § 2 of H.R. 320:

> I do not by any means underrate the value and importance of the first sentence of the amendment. It set at rest forever a vexed and troublesome question. • • • •
>
> But neither the civil rights bill nor the first sentence of the fourteenth amendment added to the

rights already guaranteed to the white citizen by the Constitution.

If the view I have taken of citizenship be correct, it follows that my colleague is in error when he attempts to find in the first sentence of this first section, the power to protect by congressional enactment, all the fundamental rights of persons and property within the States—a power which had theretofore, without question, belonged exclusively to the State governments. If my colleague's reasoning on this point be valid, I do not see how he can stop short of ousting completely the jurisdiction of the States over these subjects. He makes the clause go to the full extent of the one which was rejected. [Globe App. 152]

Next, Rep. Garfield dismissed the possibility that the privileges and immunities clause authorized federal protection of life, liberty and property:

[Rep. Hoar] quotes from Judge Washington's opinion in the case of Corfield *vs.* Coryell a statement that the fundamental rights of citizenship "are protection by the Government, the enjoyment of life and liberty, with the right to acquire and possess property of every kind, and to pursue and obtain happiness and safety."

Now, sir, if this is to be the construction of the clause, the conclusion is irresistible that Congress may assert and maintain original jurisdiction over all questions affecting the rights of the person and property of all private citizens within a State, and the State government may legislate upon this subject only by sufferance of Congress. It must be remembered that Judge Washington was interpreting the second section of the fourth article of the Constitution, and that neither he in 1820, nor any other judge before or since, has authorized so broad a construction of the power of Congress as that proposed by the gentlemen to whom I refer. [Globe App. 152]

Rep. Garfield then briefly discussed the due process clause, explaining that "it is a direct restraint upon the

governments of the States," similar to the fifth amendment's restraint upon the federal government. (Globe App. 153.) Finally, he examined the equal protection clause in a passage we quote in full:

> Mr. Speaker, I come now to consider the last clause of this first section, which is, as I believe, the chief and most valuable addition made to the Constitution in the section. That clause declares that no State shall "deny to any person within its jurisdiction the equal protection of the laws." This thought was never before in the Constitution, either in form or in substance. It was neither expressed in any words in the instrument, nor could it be implied from any provision. *It is a broad and comprehensive limitation on the power of the State governments, and, without doubt, Congress is empowered to enforce this limitation by any appropriate legislation.* Taken in connection with the other clauses of this section, it restrains the States from making or enforcing laws which are not on their face and in their provisions of equal application to all the citizens of the State. It is not required that the laws of a State shall be perfect. They may be unwise, injudicious, even unjust; but they must be equal in their provisions like the air of heaven, covering all and resting upon all with equal weight. *The laws must not only be equal on their face, but they must be so administered that equal protection under them shall not be denied to any class of citizens, either by the courts or the executive.*
>
> It may be pushing the meaning of the words beyond their natural limits, but I think the provision that the States shall not "deny the equal protection of the laws" implies that they shall afford equal protection. [Globe App. 153; emphasis added]

Before turning to the proposed legislation, Rep. Garfield summarized his analysis of the Reconstruction Amendments:

> Now, Mr. Speaker, to review briefly the ground traveled over: the changes wrought in the Constitu-

tion by the last three amendments in regard to the individual rights of citizens are these: that no person within the United States shall be made a slave; that no citizen shall be denied the right of suffrage because of his color or because he was once a slave; that no State, by its legislation or the enforcement thereof, shall abridge the privileges or immunities of citizens of the United States; that no State shall, without due process of law, disturb the life, liberty, or property of any person within its jurisdiction; and finally, that no State shall deny to any person within its jurisdiction the equal protection of the laws . [Globe App. 153]

Rep. Garfield then concluded by discussing the proposed legislation in light of his constitutional analysis. After agreeing that § 1, which reached conduct under color of state law, was entirely unobjectionable, he said,

> But *the chief complaint, is not that the laws of the State are unequal, but that even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them.* Whenever such a state of facts is clearly made out, I believe the last clause of the first section empowers Congress to step in and provide for doing justice to those persons who are thus denied equal protection.
>
> *Now, if the second section of the pending bill can be so amended that it shall clearly define this offense, as I have described it, and shall employ no terms which assert the power of Congress to take jurisdiction of the subject until such denial be clearly made, and shall not in any way assume the original jurisdiction of the rights of private persons and of property within the States—with these conditions clearly expressed in the section, I shall give it my hearty support.* These limitations will not impair the efficiency of the section, but will remove the serious objections that are entertained by many gentlemen to the section as it now stands. [Globe App. 153; emphasis added]

And, thereafter, Rep. Garfield briefly remarked on § 3 of H.R. 320 in a passage that further illuminates his views:

> Now, Mr. Speaker, I call the attention of the House to the third section of the bill. I am not clear as to the intention of the commitee, but if I understand the language correctly, this section proposes to punish citizens of the United States for violating State laws. If this be the meaning of the provision, then whenever any person violates a State law the United States may assume jurisdiction of his offense. This would virtually abolish the administration of justice under State law. In so far as this section punishes persons who under color of any State law shall deny or refuse to others the equal protection of the laws I give it my cheerful support; but *when we provide by congressional enactment to punish a mere violation of a State law, we pass the line of constitutional authority.* [Globe App. 154]

In the face of unified Democratic opposition to H.R. 320, the moderate Republicans held the balance of power. (Harris, *Quest for Equality* 47.) Moreover, there was an essential concurrence between the views of the moderate Republicans and those who supported § 2 of the bill as originally drafted. The radical Republicans' central concern was the suppression of Klan violence and the moderate Republicans fully agreed that this was a proper objective. Thus, Rep. Hawley, who supported the original draft of § 2, could say with assurance, "I believe it can easily be so modified as to meet the views of every man upon this floor who has any disposition to aid the Government of the United States in protecting the peace of this country." (Globe 382.) To the same effect Rep. Garfield could conclude his call for amending § 2 by saying,

> Amendments have been prepared which will remove the difficulties to which I have alluded; and I trust that my colleague [Mr. Shellabarger] and his com-

mittee will themselves accept and offer these amendments. [Globe App. 153]

(c) And, in fact, on the day after Rep. Garfield's speech, the moderate Republicans' objections were met in a comprehensive amendment offered by Rep. Shellabarger to §§ 2-4 of the bill. Section 2 was expanded by a list of offenses addressed for the most part to attempts to overthrow or interfere by force with the processes of the United States government. In so far as it is relevant to the present discussion, the amended § 2 made it a crime for,

> [T]wo or more persons within any State or Territory of the United States [to] * * * conspire together for the purpose, either directly or indirectly, of depriving any person or any class of persons of the equal protection of the laws, or of equal privileges or immunities under the laws, or for the purpose of preventing or hindering the constituted authorities of any State from giving or securing to all persons within such State the equal protection of the laws, * * *. [Globe 477]

Rep. Shellabarger noted that it was this provision of the amended § 2 that "relate[d] to the disputed grounds." (Globe 478). The amended § 2 also created a civil action to redress damage done by acts in furtherance of any of the proscribed conspiracies. This addition went without explanation or comment in the House, although Sen. Edmunds mentioned that addition in introducing H.R. 320 to the Senate. (Globe 568.)

Rep. Shellabarger explained that the substitute § 2 had been drafted by Rep. Cook, and that its purpose was,

> to confine the authority of this law to the prevention of deprivations which shall attack the equality of rights of American citizens; that any violation of the right, the *animus* and effect of which is to strike down the citizen, to the end that he may not enjoy the equality of rights as contrasted with his

and other citizens' rights, shall be within the scope of the remedies of this section. [Globe 478] [4]

Rep. Cook, whom Rep. Shellabarger credited with drafting the "equal protection" amendment to § 2 of H.R. 320, defended the new proposal against Democratic charges:

> I think it is within the power of Congress to protect and enforce every right secured to American citizens by the Constitution of the United States. *I do not believe, and I do not know of any man who does believe, in the language of the gentlemen who last addressed the House, that Congress has a right to punish an assault and battery when committed by two or more persons within a State. I know of no one who believes that Congress has any right to enforce the laws of a State except in the emergency contemplated in the Constitution, when the State may be unable to do so by reason of lawless combinations too strong for the State authorities to suppress.* The statement that this bill aims at any such end is an utter misstatement of its object and effect. The proposition we maintain is that whenever the Constitution of the United States secures a right to a citizen Congress may enforce and protect that right. One absolute test is this: Congress may legislate to protect any right the denial of which by a State court would give the citizen affected thereby a right to appeal to the Supreme Court of the United States for redress. [Globe 485, emphasis added] [5]

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[4] Rep. Shellabarger explained also that § 3 had been amended to extend its coverage to obstruction of the laws of the United States and to add a proviso allowing the President to use state militia, and that § 4 had been amended to drop the authorization of martial law and to allow suspension of habeas corpus only when violence becomes so extreme as to be in defiance of not only state authority but also federal authority. (Globe 478.)

[5] Rep. Cook clarified his views on this point in a dialogue with Rep. Eldridge, a Democrat from Wisconsin:

> Mr. ELDRIDGE. Suppose two men should conspire to commit an assault and battery on a person, or to take away any

On the following day, other Republicans who had opposed the original § 2 spoke in favor of the amendment. Rep. Willard, who claimed to have drafted the amendment to that section, prefaced his remarks with a strong declaration of states' rights in the area of protecting persons and property:

> I have been educated to believe that there was a clear and well defined line between the powers of the General Government and the powers of the States; that what the General Government might do was plainly set forth in the Constitution, and that outside of that the people and the States had all power; and I hold to that belief today. And in no respect has this boundary line been clearer than upon the subjects concerning which we are now proposing to legislate. On this point there has hitherto been but one opinion, and that has been held and acted upon and declared by every department of the Government. The internal affairs of a State, its police regulations, and all laws for the protection of society or the person and property of individuals against lawless violence, are matters of State concern, and entirely outside of any powers conferred upon the General Government. Certain specified crimes, as treason and counterfeiting and offenses against the laws of the United States, the General Government has jurisdiction of and can punish; but it can no more punish offenses against life and property, as such, than it can regulate the distribution of the property of estates, the enforcement of civil contracts, the matters of taxation, or the proceedings in courts, in the States. *The individual, for all purposes except for the purpose of carrying into effect the Constitution of the United States and the laws made in pursuance thereof, looks to the State government for protection, and can have*

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of his rights of property or of liberty, can the United States redress that wrong?

Mr. COOK. Only in case the emergency has arisen, contemplated in the Constitution, in which the aid of the national Government may be invoked in aid of State laws. [Globe 485]

it nowhere else; and in the minds of those who framed the Constitution probably no belief was firmer than that for all time it was much safer to leave the States to protect the rights of the people than to place that duty upon the General Government. I believe that in this they were especially wise; but whether wise or not, I have no doubt that they had that opinion and made the Constitution to conform to it. [Globe App. 187; emphasis added]

Rep. Willard then explained the amendment to § 2:

> [T]he essence of the crime should consist in the intent to deprive a person of the equal protection of the laws and of equal privileges and immunities under the laws; in other words, that the Constitution secured, and was only intended to secure, equality of rights and immunities, and that we could only punish by United States laws a denial of that equality. The committee having now adopted and recommended this description of the offense instead of the one originally recommended by them, * * * I cheerfully give it my support. [Globe App. 188]

Rep. Burchard stated his objections to the scope of the original bill and announced his support of the amended version based on the following understanding of the Constitution and of the effect of the amendment "proposed by the committee":

> That amendment obviates in a great measure the objections and the doubtful construction as to the extent of jurisdiction for the punishment of crimes intended by the bill. It is not denial of protection, but of equality of protection, which constitutes the offense against the United States. *The conspiracies it seeks to punish are those designed to prevent the equal and impartial administration of justice.* These are essentially different from combinations and conspiracies to resist the execution of ordinary process. They must be aimed to prevent the enjoyment of equal civil rights. *The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United*

States his constitutional right to equality of protection. It is this view that this legislation is competent. The civil rights and enforcement bills heretofore passed provided for the punishment of those acting as State officers who attempted to execute the laws of a State in conflict with the Constitution of the United States. Is not an individual acting as a State officer, upon whom, as such officer, the Constitution and laws of the United States impose the performance of those duties, also amenable to the laws of the United States for their non-performance? If the refusal of a State officer, acting for the State, to accord equality of civil rights renders him amenable to punishment for the offense under United States law, conspirators who attempt to prevent such officers from performing such duty are also clearly liable. [Globe App. 315; emphasis added] [6]

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[6] Rep. Poland, too, expressed his opposition to the original bill and his support for the amended version as meeting constitutional standards:

> [T]he last clause of the fourteenth amendment provides that no State shall deny the equal protection of the laws to its citizens. Now, in my judgment, that is a constitutional enactment that each State shall afford to its citizens the equal protection of the laws. *I cannot agree with several gentlemen upon my side of the House who insist that if the State authorities fail to punish crime committed in the State therefore the United States may step in and by a law of Congress provide for punishing that offense;* I do not agree with those gentlemen.
>
> *But I do agree that if a State shall deny the equal protection of the laws, or if a State make proper laws and have proper officers to enforce those laws, and somebody undertakes to step in and clog justice by preventing the State authorities from carrying out this constitutional provision, then I do claim that we have the right to make such interference an offense against the United States;* that the Constitution does empower us to aid in carrying out this injunction, which, by the Constitution, we have laid upon the States, that they shall afford the equal protection of the laws to all their citizens. [Globe 514; emphasis added]

On April 6, 1871, Rep. Shellabarger closed the House debate with a description of the conspiracy at which the bill was aimed:

> Stated in another way, the dual allegation is that the South and ruling half of the Democratic party is now engaged in the business of *overthrowing the political rights of the freed race and of all constitutions and laws securing them*, and that the overthrow is satisfactorily progressing under the cover of the night and the mask, and of perjury, by means of scourgings, burnings, and butcheries, e[illegible]djusted, with infernal skill, in the scales of their [illegible]nitude, to the attainment of the end aimed at. * * [W]hat] do these conspirators mean? I answer, they mean the overthrow of the equality, under the Constitution and its laws, of the enfranchised race. * * * [T]hese banded conspirators have the political aims I attribute to them, to wit, to "trample into dust" these newly-acquired political rights of the freedmen and the constitutions and laws which confer them * * *. [Globe 516-517; emphasis added]

With that speech, the House concluded its initial debates on H.R. 320. An amendment offered by Rep. Monroe adding the words "or go in disguise upon the public highway, or upon the premises of another" (Globe 515), and other minor amendments were accepted, and the bill passed the House by a vote of 118 to 91. All of the moderate Republicans who had voiced oppisition to the original proposal voted for the bill as amended. (Globe 522.)[7]

(d) After the House acted the initial Senate debate on H.R. 320 was quite brief. The Senate took up considera-

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[7] While the House had been debating H.R. 320, the Senate had been discussing similar issues in debating a resolution by Sen. Sherman to direct the Judiciary Committee to bring out a similar bill. Before H.R. 320 reached the Senate, several Republican Senators had expressed an understanding of the Fourteenth Amendment similar to that of the moderate Republicans in the House. (See

tion of the bill on April 11, 1871 and voted the bill out as amended on April 14.

Sen. Edmunds reported the bill for the Senate Judiciary Committee. Much of his opening speech was taken up with explaining the amendments suggested by that Committee to the House bill. He began by stating:

> The committee did not undertake to exercise any matter of taste in making these amendments, and *did not intend to go beyond the scope of the House bill.* All that it undertook to do was to do those things that it thought essential to make the bill, within its present constitutional scope and within the scope of its expediency also, so perfect that it would stand the test of a criminal inquiry in the courts of justice, and to embrace within its reach some of the objects which seem to have been accidentally omitted in the preparation of it in the House of Representatives. [Globe 567; emphasis added]

The Senate Committee left § 1 of the bill unchanged but several minor technical changes to § 2 were made. First, the Senate version provided redress for officers of the United States injured "while engaged" in carrying out official duties rather than, as the House bill provided, "on account" of carrying out official duties. Sen. Edmunds explained that it may be too difficult to prove that harm was done "on account" of the official's actions. (Globe 567.) Protection for those involved in proceedings before United States courts was extended to "any party" as well as to "any witness," as the House had provided. (Globe 567.)

Harris, *Quest for Equality* 49-50; Flack, *Adoption of the Fourteenth Amendment* 245-247.) Sen. Frelinghuysen, for example, insisted that, "The Federal Government should only interfere to protect the citizen of the United States in his privileges when the State clearly and persistently fails to do so." (Globe 501-502; *accord* 506 (Sen. Pratt), Globe App. 251 (Sen. Morton).

The last amendment to § 2 discussed by Sen Edmunds was one m.king it a crime to conspire for the purpose of obstructing the due course of justice in any state or territory with intent to deny any citizen the due and equal protection of the laws. (Globe 567.) Sen. Morton asked whether this was intended to apply to proceedings in the state courts, and Sen. Edmunds replied:

> Certainly, referring to "the equal and impartial course of justice" mentioned in the second section on the third page. This obstruction of the equal and impartial course of justice, however, must, under the provisions of all this bill, go so far as to deny and withhold from citizens of the United States that equality of protection in seeking justice which the Constitution of the United States gives to them. We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because he was a Vermonter, (which is a pretty painful instance that I have in my mind in the State of Florida within a few days where a man lost his life for that reason,) then this section could reach it. [Globe 567]

The Senate Judiciary Committee proposed even less extensive amendments to §§ 3 & 4 of the bill. Sen. Edmunds discussed these briefly and provided a short statement of his understanding of the bill, explaining with respect to § 2:

> The second section, it will be observed, only provides for the punishment of a conspiracy. It does not provide for the punishment of any act done in pursuance of the conspiracy, but only a conspiracy to deprive citizens of the United States, in the various ways named, of the rights which the Constitution

> and the laws of the United States made pursuant to it give to them; that is to say, conspiracies to overthrow the Government, conspiracies to impede the course of justice, conspiracies to deprive people of the equal protection of the laws, whatever those laws may be. It does not provide, as I say, for any punishment for any act which these conspirators shall do in furtherance of the conspiracy. It punishes the conspiracy alone, leaving the States, if they see fit, to punish the acts and crimes which may be committed in pursuance of the conspiracy. I confess that I thought myself it was desirable, to make the bill complete, to make it completely logical and completely effective, that a section should have been added providing not only for punishing the conspiracy, but providing also in the same way for punishing any act done in pursuance of the conspiracy. This section gives a civil action to anybody who shall be injured by the conspiracy, but does not punish an act done as a crime. [Globe 568]

Sen. Pool (the Republican from North Carolina who had authored the sixth section of the Enforcement Act of 1870, the source of Rep. Shellabarger's original draft of § 2 (Globe App. 68)), in an analysis that paralleled Rep. Garfield's, found support for H.R. 320, as amended, in the equal protection clause of the Fourteenth Amendment:

> The protection of the laws can hardly be denied except by failure to execute them. While the laws are executed their protection is necessarily afforded. * * *
>
> By the first section of the fourteenth amendment, a new right, so far as it depends on express constitutional provision, is conferred upon every citizen; it is the right to the protection of the laws * * *. Where any State, by commission or omission, denies this right to the protection of the laws, Congress may by appropriate legislation, enforce and maintain it. [Globe 608]

On April 14, 1871, Sen. Edmunds offered a noncontroversial amendment to § 2, punishing interference with

federal elections (Globe 704), and in concluding the Senate debate summed up the reasons for the legislation:

> The disorders in the South are not like the disorders in many other States, where there always are disorders, the results of private malice. The slaying of men there, as a rule, is not because the murderer and the assassin have any hostility or quarrel with the person who is the victim; but it is one step in the progress of a systematic plan and an ulterior purpose, and that is not to leave in any of those States a brave white man who dares to be a Republican or a colored man who dares to be a Republican or a colored man who dares to be a voter. The one is to be expelled or slain and the other is to be reduced to what they consider to be his normal condition. And while it is possible that there are many people in those States, as I have no doubt there are, who are pained at the severity and cruelty of these political methods, they, notwithstanding, do encourage and tacitly consent to them by their inaction. [Globe 702] [8]

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[8] Throughout the debate, the theme was repeated that the particular targets of the Klan conspiracy were the emancipated black citizens and their white allies in the Republican Party. (*E.g.*, Globe App. 101-107 (Sen. Pool) and Globe 251 (Sen. Morton) 412 (Rep. E. H. Roberts), 504-505 (Sen. Pratt). Rep. Perry expressed the views of the Republicans in Congress in particularly trenchant terms:

> *The most intelligent and probable explanation of motives imputes to them a rancorous and implacable discontent on account of the political and civil rights conferred on colored people by the constitutional amendments.* Their operations are, therefore, directed chiefly against blacks and against white people who by any means attract attention as earnest friends of the blacks.
>
> The aim appears to be to put them under fear, so that they will be silent when freemen should be at the polls; or, failing in that, to compel them to abandon citizenship in that part of the country; or, failing in that, to murder and mutilate them, disperse their families, burn their houses, and steal or destroy their property. In carrying out these purposes, neither mercy

At the end of the debate on the second conference report on H.R. 320, Representative Garfield expressed satisfaction with the bill in its final form:

> I believe, Mr. Speaker, that we have at last secured a bill, trenchant in its provisions, that reaches down into the very heart of the Ku Klux Klan organization, and yet is to guarded as to preserve intact the autonomy of the States, the machinery of the State governments, and the municipal organizations established under State laws. [Globe 808.]

4. *The Lessons of the Legislative Materials*

The *Griffin* Court stated that the legislative materials "point unwaveringly" to the conclusion that § 1985(3) "cover[s] private conspiracies" but not "all tortious conspiratorial interferences with the rights of others." (403 U.S. at 101.) The foregoing recitation of those materials confirms that conclusion. (*See, e.g.*, Rep. Cook (*supra* p. 28); Rep. Willard (*supra* pp. 29-30); Sen. Edmunds (*supra* p. 34).) And, that recitation points—sometimes unwaveringly and sometimes with less certainty—to three further conclusions as to the scope of § 1985(3), each of which requires rejection of the plaintiffs' claim in this case.

(a) The dominant concern of the moderate Republicans who sought and secured a limiting amendment to § 2 of the 1871 Act was to assure that Congress, in providing a cause of action against tortious conspiracies, did not exceed the scope of the Federal Government's authority stated in the Reconstruction Amendments to the Constitution as those Republicans understood those Amend-

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nor decency is observed. If their main inspiration is hostility to the rights given to the colored people under the thirteenth, fourteenth, and fifteenth amendments, it would extend to all who should befriend them; it would extend to the Republican party, to whom the blacks owe emancipation, and to whom alone they can look for sympathy and protection. [Globe App. 78; emphasis added]

ments. The moderate Republicans' concern focused on the potential application of § 2 of the 1871 Act to deprivations of rights stated in the Fourteenth Amendment. As Rep. Garfield made plain, those legislators viewed the Fourteenth Amendment as a "broad and comprehensive *limitation on the power of the State government* * * *." That limitation, he added, applies "even where the laws are just and equal on their face, yet, by a systematic maladministration of them, or a neglect or refusal to enforce their provisions, a portion of the people are denied equal protection under them." And the condition Rep. Garfield stated for the moderate Republicans' support of § 2 of the 1871 Act was that the provision be amended to

> clearly define this offense, as I have described it, and shall employ no terms which assert the power of Congress to take jurisdiction of the subject until such denial be clearly made, and shall not in any way assume the original jurisdiction of the rights of private persons and of property within the States * * *. [Globe App. 153]

It appears, moreover, from Rep. Garfield's speech that the moderate Republicans had already drafted an amendment meeting those specifications and from Rep. Shellabarger's speech the next day that the moderate Republicans' amendment, as they wrote that amendment, was accepted by the proponents of the original § 2 (and thereafter by the House and, with minor technical amendments, by the Senate). As Rep. Burchard said: The gravamen of the offense is the unlawful attempt to prevent a State through its officers enforcing in behalf of a citizen of the United States his constitutional right to equality of protection." (Globe App. 315.)

The sum and substance of the compromise struck and enacted into law with regard to conspiracies that interfere with rights protected by the Fourteenth Amendment, then, is clearly and accurately stated by Justice Stevens concurring opinion in *Novotny*:

> The import of the language * * * as well as the relevant legislative history, suggests that the Congress which enacted [the original § 1985(3)] was concerned with providing federal remedies for deprivations of rights protected by the Constitution and, in particular, the newly ratified Fourteenth Amendment. * * *
>
> Some privileges and immunities of citizenship, such as the right to engage in interstate travel and the right to be free of the badges of slavery, are protected by the Constitution against interference by private action, as well as impairment of state action. * * *
>
> Other privileges and immunities of citizenship such as the right to due process of law and the right to the equal protection of the laws are protected by the Constitution only against state action. * * *
>
> If * * * private persons engage in purely private acts of discrimination * * * they do not violate the Equal Protection Clause of the Fourteenth Amendment. The rights secured by the Equal Protection and Due Process Clauses of the Fourteenth Amendment are rights to protection against unequal or unfair treatment by the State, not by private parties. Thus, while § 1985(c) does not require that a defendant act under color of state law, there still can be no claim for relief based on a violation of the Fourteenth Amendment if there has been no involvement by the State. The requirement of state action, in this context, is no more than a requirement that there be a constitutional violation. [442 U.S. at 382-385; footnotes omitted.]

The holding of the majority below that § 1985(3) is applicable where the plaintiff's claim has a Fourteenth Amendment base even though the record shows that the objective of the conspiracy does not encompass governmental interference with the plaintiff's claimed constitutional right is therefore fundamentally unsound.

(b) A precise definition of the "invidiously discriminatory motivation stressed by the sponsors of the [success-

ful] limiting amendment [to § 2 of the 1871 Act]" (*Griffin*, 403 U.S. at 101) that brings a conspiracy within that provision is not easily framed. But this much is plain, the broadest statement of the provision's scope by a proponent that we have found or that has been cited in the course of this litigation, is that of Sen. Edmunds who said:

> We do not undertake in this bill to interfere with what might be called a private conspiracy growing out of a neighborhood feud of one man or set of men against another to prevent one getting an indictment in the State courts against men for burning down his barn; but, if in a case like this, it should appear that this conspiracy was formed against this man because he was a Democrat, if you please, or because he was a Catholic, or because he was a Methodist, or because h ewas a Vermonter * * * then this section could reach it. [Globe 567]

The meaning of the antithesis drawn by Sen. Edmunds, and a lucid explanation as to why its proper application to a case like this compels the conclusion that the plaintiffs here do not have a valid § 1985(3) claim, is stated by Judge Merritt in *Browder* v. *Tipton*, 630 F.2d 1149, 1154 (C.A. 6):

> By failing to show the unique fashion in which they exercise a fundamental right, plaintiffs fail to allege that they are members of a protected class. Defendants here, given their motive, would have thwarted due process for all those—and only those—who crossed [a] picket line. Crossing a picket line is not a special exercise of the right to a probable cause arrest in the same sense—to use another of [Sen.] Edmunds' examples—that being a Democrat is a discrete and particular exercise of the First Amendment. Thus, plaintiffs' class is simply one of picket line crossers. No matter how "invidious" any discrimination against this class may be, the right to cross a picket line is no more constitutionally protected than is the right to be an unpopular barn owner. [630 F.2d at 1154].

As the Tenth Circuit elaborated this point in *Silkwood* v. *Kerr-McGee Corp.*, 637 F.2d 743, 746 (C.A. 10):

> To state a cause of action under section 1985(3) the law requires prejudice against a class *quo* class. Here, * * * no general prejudice which transcends the immediate dispute is shown. Rather the hatred which defendants allegedly harbor is against [plaintiffs] arising out of the activities of the parties involved. See *Lessman* v. *McCormick*, 591 F.2d 605, 608 (10th Cir. 1979) * * *. As was aptly stated by the district court, to hold otherwise would make § 1985(3) "applicable to all conspiratorial interferences with the rights of others, as there are no bounds upon the ingenuity of counsel in pleading novel and diverse classes to fit every conceivable situation." 460 F. Supp. at 407. [637 F.2d at 748]

On the facts found below, in this case, as in *Silkwood*, "the feud, * * * is private; no general prejudice which transcends the immediate dispute is shown. Rather the hatred which defendants allegedly harbor is against [plaintiffs] arising out of the *activities of the parties involved.*" (*Id.* at 748; emphasis added.)

(c) While our showing to this point is, we believe, sufficient to require reversal of the decision below, we add one further and more general word to the foregoing discussion of the § 1985(3) concept of "class animus."

The point of the 1871 Act was to provide redress for the victims of the contemporaneous conspiratorial activities of the Ku Klux Klan: the Freedmen and those who made common cause with the Freedmen. That much is perfectly plain from the genesis of the bill and the legislative debates. And, although the matter is not entirely free from doubt, the debates indicate that while that conspiracy was the paradigm case, the Act was intended to apply to such conspiracies generally and to protect others who might find themselves in like jeopardy. The difficulty is that there is no single clear and definitive statement by the 1871 Act's sponsors of the requisites of a "Klan conspir-

acy" or of the "kind of invidiously discriminatory motivation" (*Griffin*, 403 U.S. at 101) that characterizes such a conspiracy.

The most accurate distillation of the sponsors' intent in this regard is, we believe, that the Act in general, and § 2 in particular, provides a federal cause of action against tortious wrongs motivated by an intent to "overthrow[] the political rights * * * and all constitutions and laws securing [those rights]" (Globe 516 (Rep. Shellabarger)), of a discrete group, such as the Freedmen, who claim the right to full and equal citizenship on the same terms as the other groups in our Nation. As Rep. Shellabarger stated in concluding the speech from which we have just quoted, "[T]hese banded conspirators have the political aims I attribute to them, to wit, to 'trample into dust' these newly-acquired political rights of the freedmen and the constitutions and laws which confer them * * *" (Globe 517. See also Globe App. 78 (Rep. Perry).) It was the redress of wrongdoing so motivated —wrongdoing to undo the Reconstruction Amendments— that the 42nd Congress was willing, despite its respect for the primacy of the states in protecting life and property, to recognize as within the Federal Government's proper sphere of authority. Section 1985(3) was framed, in other words, to safeguard the large public purposes of maintaining our system of government, not to police economic competition in the private sector.

II. The Analysis Of The Majority Below Does Transmute 42 U.S.C. § 1985(3) Into a General Federal Tort Law

The principal dissent below charged that the majority below "have released a brand new federal tort * * * " (App. A-48). We submit that this is a correct assessment, and show that the majority below did so: (1) by overreading *Griffin*; (2) by creating a new First (and Fourteenth) Amendment right to work for a non-union employer; and (3) by creating an *ad hoc* "class" of a kind plainly not contemplated by § 1985(3). It is concededly a

closer question whether, *if* the individual plaintiffs have stated a claim, their employer is also entitled to relief under § 1985(3). We show that the better view is that the employer is not. We conclude by quoting the principal dissent's demonstration that the "genie" which the majority has released cannot be reconfined in his bottle on any principled basis; the majority's theory violates the precepts of *Griffin* by 'interpreting § 1985(3) as a general federal tort law." (403 U.S. at 102.)

1. Plaintiffs' claim fails because they did not prove (or indeed present any evidence) that the objective of the conspiracy encompassed any governmental interference with an associational freedom. As shown *supra* pp. 37-39, such proof is essential to their cause of action. That proposition is demonstrated by Justice Stevens in his concurring opinion in *Novotny* (442 U.S. at 381-385)[9] from which we quoted above, and in his opinion as a Court of Appeals Judge in *Dombrowski* v. *Dowling*, 459 F.2d 190 (C.A. 7).

The majority of the court of appeals in this case acknowledged that its decision is in conflict with *Dombrowski* but considered the latter case (and Justice Stevens' concurrence in *Novotny*) to be inconsistent with the "Supreme Court's express reasoning in *Griffin*" (App. A-12); in its view, the "clear decisional words in *Griffin* simply will not permit us to speculate that section 1985 (3) might not afford a remedy for private conspiracies" (App. A-13). We submit that in so concluding the majority below missed the critical distinction drawn in the *Dombrowski* opinion "between the interests of the plaintiff that the statute was enacted to protect and the conduct of the defendants which it proscribes" (459 F.2d at 193).

Dombrowski makes clear that the "clear, decisional words in *Griffin*" on which the majority below relied

[9] Justice Powell expressed his agreement with Justice Stevens' views (442 U.S. at 378).

were addressed only to the latter question, *viz.* whether some form of *governmental participation in the conspiracy itself* is an essential requirement of a cause of action under § 1985(3). That was the question which *Collins* v. *Hardyman*, *supra*, 341 U.S. 651 had answered in the affirmative, and which *Griffin*, overruling *Collins*, answered in the negative. As the Seventh Circuit said in *Dombrowski*, "although *Griffin* makes it perfectly clear that some purely private conspiracies among defendants are proscribed by § 1985(3), *Griffin* did not purport to delineate the scope of the rights secured by the statute." (459 F.2d at 194.) Since the conspiracy in *Griffin* was directed against rights which the Constitution protects against private interference, "the Court did not have occasion to consider the effect of the statute on private conspiracies designed to deprive the plaintiff of rights protected by the Fourteenth Amendment." (459 F.2d at 195.)

2. In ruling that "merely working for a nonunion employer [does] qualify for constitutional protection" (App. A-12) the majority below broke new constitutional ground by misinterpreting the precedents relied upon.

The majority below said that the "Supreme Court has long recognized that association for the purpose of advancing economic, as well as political or religious, interests falls within the protection of the First Amendment" and "that the corollary of the right to associate to advance economic interests is the right not to associate." (App. A-13, citing *Trainmen* v. *Virginia*, 377 U.S. 1, 8 and *Thomas* v. *Collins*, 323 U.S. 516, 531 for the first proposition and *Abood* v. *Board of Education*, 431 U.S. 209 for the "corollary.") But the proposition that, "[t]o compel employees financially to support their collective-bargaining representatives has an impact upon their First Amendment interests" (App. A-13, quoting 431 U.S. at 222), does not remotely lead to the conclusion that an individual has a constitutional right to work for a nonunion employer. To draw that conclusion

from *Abood* is to overlook the Court's explanation that the "impact upon [employees'] First Amendment interests" is due to their possible "ideological objections" to the union's activities. (431 U.S. at 222.) It is for that reason, as the *Abood* Court developed, that "To be required to help finance the union as a collective-bargaining agent might well be thought * * * to interfere in some way with an employee's freedom to associate for the advancement of ideas, or to refrain from doing so, as he sees fit." (*Id.*)

The conspiracy found in this case, however, was not to compel the individuals who worked for Cross to become members of a union; indeed it was found (and respondents have acknowledged) that some of Cross' employees were already union members (App. A-5; see Br. in Opp. to Pet. for Cert., p. 15, n.5 cont.).[10] Nor was it found that the defendants' purpose was to compel the making of payments to a union under a union security provision, as in *Abood*; indeed, such an agreement would be unlawful in Texas.[11] The object found was rather to prevent these individuals from working for a "nonunion employer" (App. A-13)[12]—an employer who did not have collective bargaining agreements with the unions. That

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[10] Moreover, as the principal dissent observes with respect to the two individual plaintiffs: "Scott was a supervisor and Matthews was a clerical worker. It has not been shown that either of them was even eligible for membership in any of the unions involved." (App. A-43.)

[11] Texas' Right to Work Law prohibits the denial of employment to anyone because of a failure to pay "any fee, assessment, or sum of money whatsoever" to a union. (Tex. Rev. Civ. Stat. Ann. art. 5154a(8a) (Vernon 1971). See App. A-42-43, n. 39.)

[12] To be sure, as the dissenting judges elaborated (App. A-43) the majority below resorts to a variety of locutions in describing the object of the conspiracy. However, our statement in the text is acknowledged by the majority's own statement of the issue (App. A-13.)

is not an associational interest as described in any cases cited by the majority below. It has no ideological content. It does not involve membership in any organization (political or economic) or participation in an "assembly" as that term is used in the First Amendment. (Cf. *DeJonge* v. *Oregon*, 299 U.S. 353; *Thomas* v. *Collins*, *supra*). It relates only to a purely economic relationship. Under the theory of the majority below every relationship between a worker and an employer or any business relationship between any persons would be an "association" protected by the First Amendment. There is no precedent in this Court for that proposition. To the contrary in *Smith* v. *Arkansas State Highway Employees*, 441 U.S. 463, the Court ruled:

> In the case before us, there is no claim that the Highway Commission has prohibited its employees from joining together in a union, or from persuading others to do so, or from advocating any particular ideas. There is, in short, no claim of retaliation or discrimination proscribed by the First Amendment. Rather, the complaint of the union and its members is simply that the Commission refuses to consider or act upon grievances when filed by the union rather than by the employee directly.
>
> Were public employers such as the Commission subject to the same labor laws applicable to private employers, this refusal might well constitute an unfair labor practice. We may assume that it would and, further, that it tends to impair or undermine—if only slightly—the effectiveness of the union in representing the economic interests of its members. Cf. *Hanover Township* [*Federation of Teachers v. Hanover Community School Corp.*, 457 F.2d 456 C.A. 7).[13]]

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[13] The Seventh Circuit had there stated:

> [The constitutionally] protected "union activities" include advocacy and persuasion in organizing the union and enlarging its membership, and also in the expression of its views to

> But this type of "impairment" is not one that the Constitution prohibits. Far from taking steps to prohibit or discourage union membership or association, all that the Commission has done in its challenged conduct is simply to ignore the union. That it is free to do.

3. As the principal dissent below observed, "we search the majority opinion in vain for something more than an ad hoc definition of the class to which the [individual] plaintiffs * * * belong. * * * The plaintiffs are, we submit, not members of a class at all, but simply two individuals injured in the same assault." (App. A-43, A-44; footnote omitted.) And we cannot improve on that dissent's showing that even if there is a coherent class it is not one protected by § 1985(3):

> If the class recognized by the majority includes, as we have supposed, persons who do not belong to a union and who want to work for an employer who hires other nonunion employees, there are yet other reasons not to accord such a class § 1985(3) protection. This class is one newly defined by this case, not one having any previous discernible jurisprudential identity. It is not a "class" marked by historical oppression, by minority status, by any social or political animus directed against it, by any political or religious belief, or by any of the indicia usually used to identify a class of persons who must be accorded special protection. The animus here was not

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employees and to the public. For that reason, the State may not broadly condemn all union activities or discharge the employees simply because they join a union or participate in its activities. It does not follow however, that all activities of a union or its members are constitutionally protected.

Thus, the economic activities of a group of persons (whether representing labor or management) who associate together to achieve a common purpose are not protected by the First Amendment. Such activities may be either prohibited or protected as a matter of legislative policy. [457 F.2d at 460-461, footnotes omitted.]

See also the principal dissent below App. A-42 to A-43.

> directed at the membership of the plaintiffs in such a class or at their association together either as persons or in some anti-union group campaign, but at their *activities*: working without union membership for an employer who wished to hire them. [App. A-46.]

If the First Amendment right to associate does not encompass the right to bargain collectively (and in *Smith*, state action was unmistakably present), the right *not* to associate cannot include the right *not* to bargain collectively. (See also the *Browder* and *Silkwood* decisions quoted *supra*, pp. 40-41.)

4. Having given § 1985(3) relief to the individual plaintiffs by defining an *ad hoc* class, "not having any previous discernible jurisprudential identity" (principal dissent, App. A-46), the majority below tightened the ratchet another notch for the benefit of the plaintiff Cross Corporation by observing that the "language of section 1985(3) specifically provides a remedy for any person injured by an act taken in furtherance of the conspiracy," (App. A-19). That is also the view expressed by Justice White in his dissenting opinion in *Novotny*, 443 U.S. at 390. The principal dissent in this case, however, considered that Justice White's view was rejected by the Court's holding in *Novotny* "that § 1985(3) created no new rights but is remedial in nature," thereby precluding "a substantive cause of action in the statute for non-class members." (App. A-47.) This interpretation of *Novotny* is buttressed when it is appreciated that if it had been thought that such a cause of action lies, the Court would have been required to decide whether Mr. Novotny was entitled to relief on the theory that he had been injured by a conspiracy against *women* satisfying the elements of a § 1985(3) claim, rather than being able to limit its consideration to the question whether § 1985(3) provided a remedy for a violation of Mr. Novotny's rights under Title VII of the 1964 Civil Rights Act. But as the Court's opinion in *Novotny* did not *ex-*

pressly reject the possibility of relief for non-class members, we shall briefly comment further on this issue.

As an original proposition the argument from the language of § 1985(3) is not without force, especially since the language is not narrowed by the debates, which only refer to, but do not explain the inclusion of a damage remedy in § 2 of the 1871 Act. However, the parallel remedial language of § 1 of that Act, now 42 U.S.C. § 1983, is equally broad; yet this Court held in *Warth* v. *Seldin*, 422 U.S. 490, 514, that a party who is not in the protected class may not recover under that provision. Moreover, while it is ordinarily presumed that Congress has provided a remedy to persons or classes for whose special benefit legislation is enacted, it is likewise reasonable to assume, absent a clear indication to the contrary, that Congress does not intend to provide a remedy for parties who are outside the protected class. It seems unrealistic, if not anachronistic,[14] to attribute to the 1871 Congress an intent to separate right from remedy in the very amendment to the bill which was adopted to accommodate the insistence of the moderate Republicans that Congress enforce the Reconstruction Amendments without interfering with the authority of the States.

At the conclusion of its discussion of the scope of the protected class (App. A-20) the majority below endeavors, in the dissenting judges' apt metaphor, to reconfine the genie in the bottle. The principal dissent's critique merits quotation in full:

> Recognizing implicitly that they have released a brand new federal tort, our colleagues attempt in dicta to enclose this genie in a larger bottle. They say that they would not extend § 1985(3) to *every* kind of unlawful conduct, only to the limited instance where "there is no campaign to organize employees *and* force or violence is used to stake out one group's territorial claim and to deprive other workers and

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[14] Cf. *Hayes v. Michigan Central R.R. Co.*, 111 U.S. 228, 239-240 (1884).

their employer of the right to freely associate with one another." We see no basis in the statute for distinguishing violent unlawful conduct from other kinds of unlawful activity such as unfair labor practices, secondary boycotts, and criminal libel, or, indeed, criminally reckless driving. The rationale of the decision cannot be thus confined save by ipse dixit. (If the decision is based on principle, and not like Justice Roberts' railway ticket, "good for this day and train only," it extends logically not only to a multitude of "classes" having some sort of economic or "associational" tie but protects each member of those classes against any kind of unlawful conduct that results in bodily injury, or even, perhaps, economic harm. [App. A-48 to A-49; footnotes omitted.]

CONCLUSION

For the above-stated reasons, the judgment of the court of appeals should be reversed with directions to remand this cause to the district court for dismissal of the complaint.

Respectfully submitted,

LAURENCE GOLD
815 16th Street, N.W.
Washington, D.C. 20006
(202) 637-5390
(Counsel of Record)

MARTIN W. DIES
P.O. Box 490
Orange, Texas 77360
Attorneys for Petitioners

GEORGE KAUFMANN
2101 L Street, N.W.
Washington, D.C. 20037

JAMES B. COPPESS
1925 K Street, N.W.
Washington, D.C. 20006
Of Counsel